

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAMON MERVIN STUTESMAN,

Petitioner,

No. CIV S-05-0059 LKK JFM P

vs.

ROSANNE CAMPBELL, et al.,

Respondents.

ORDER

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1997 conviction, entered pursuant to a guilty plea, on charges of second degree murder and assault with a deadly weapon. On March 21, 2006, this action was dismissed as barred by the statute of limitations. Judgment was entered on the same day.

On April 26, 2006, petitioner filed a motion for an extension of time to appeal the judgment. Petitioner filed a notice of appeal on the same day. Both documents are dated April 21, 2006, and both were served on counsel for respondents on that date. Good cause appearing, the court construes the documents as filed on April 21, 2006. See Houston v. Lack, 487 U.S. 266, 270-72, 275 (1988).

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1 Petitioner's notice of appeal was due within thirty days of the entry of judgment
2 herein. See Fed. R. App. P. 4(a)(1)(A). It was therefore due on or before April 20, 2006 and was
3 filed one day late.

4 Rule 4(a)(5) of the Federal Rules of Appellate Procedure authorizes a district
5 court to extend the time to file a notice of appeal if (1) a party files a motion for extension of
6 time not later than thirty days after expiration of the time for filing a notice of appeal under Fed.
7 R. App. P. 4(a)(1); and (2) the "party shows excusable neglect or good cause." Fed. R. App. P.
8 4(a)(5).¹

9 Where, as here, the court is presented with timely motion to extend the time to file
10 a notice of appeal, the court has "wide discretion as to whether to excuse" the delay in filing the
11 notice of appeal. Pincay v. Andrews, 389 F.3d 853, 859 (9th Cir. 2004) (en banc). The court
12 applies the "excusable neglect" standard "in situations in which there is fault; in such situations,
13 the need for an extension is usually occasioned by something within the control of the movant."
14 Fed. R. App. P. 4(a)(5)(A)(ii), advisory committee's note, 2002 amendment. The court weighs
15 four factors to determine whether excusable neglect has been shown, including

16 (1) the danger of prejudice to the non-moving party, (2) the length
17 of delay and its potential impact on judicial proceedings, (3) the
18 reason for the delay, including whether it was within the reasonable
 control of the movant, and (4) whether the moving party's conduct
 was in good faith.

19 Pincay, at 855 (citing Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,
20 507 U.S. 380, 395 (1993)). "The good cause standard applies in situations in which there is no
21 fault – excusable or otherwise. In such situations, the need for an extension is usually occasioned
22 by something that is not within the control of the movant." Fed. R. App. P. 4(a)(5)(A)(ii),
23 advisory committee's note, 2002 amendment.

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25 ¹ Petitioner's motion was served on counsel for respondents, as required by Fed. R. App.
26 4(a)(5)(B).

1 In a declaration appended to his motion for extension of time, petitioner explains
2 his delay as the result of limited access to the prison law library following receipt of the
3 judgment in this action. Specifically, petitioner avers that he only had nine days of access to the
4 prison law library after he received the judgment in this action, during which time he “diligently
5 sought research on the application to appeal, on the mechanics of requesting a Certificate of
6 Appealability” and on “procedural bars and defaults.” (Declaration of Damon Mervin
7 Stutesman, at ¶¶ 7-10.)

8 The court finds the excusable neglect standard more appropriate in the
9 circumstances of this case, as petitioner did have access to the prison law library during the thirty
10 day period following entry of judgment in this case and therefore some modicum of control over
11 when he prepared and submitted the notice of appeal. The court further finds that all of the
12 factors to be considered when applying the excusable neglect standard weigh in favor of
13 petitioner. The one day delay in filing petitioner’s notice of appeal caused no danger of prejudice
14 to respondents, nor did that delay have any potential adverse impact on judicial proceedings.
15 Moreover, the asserted reason for the delay shows that petitioner was acting in good faith to
16 ascertain the legal grounds on which he might proceed further with this action. Under the
17 circumstances, petitioner has shown excusable neglect for his one day delay in filing his notice of
18 appeal. Petitioner’s motion for an extension of time will therefore be granted.

19 Before petitioner can appeal from the dismissal of this action, a certificate of
20 appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A certificate of
21 appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial
22 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either
23 issue a certificate of appealability indicating which issues satisfy the required showing or must
24 state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

25 Where, as here, the petition was dismissed on procedural grounds, a certificate of
26 appealability “should issue if the prisoner can show: (1) ‘that jurists of reason would find it


1 debatable whether the district court was correct in its procedural ruling'; and (2) 'that jurists of
2 reason would find it debatable whether the petition states a valid claim of the denial of a
3 constitutional right.'" Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.
4 McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000)).

5 After careful review of the entire record herein, this court finds that petitioner has
6 not satisfied the first requirement for issuance of a certificate of appealability in this case.
7 Specifically, there is no showing that jurists of reason would find it debatable whether this action
8 is barred by the statute of limitations. Accordingly, a certificate of appealability should not issue
9 in this action.

10 In accordance with the above, IT IS HEREBY ORDERED that:

- 11 1. Petitioner's motion for an extension of time to file a notice of appeal is
12 granted;
13 2. A certificate of appealability should not issue in this action; and
14 3. The Clerk of the Court is directed to process petitioner's notice of appeal to the
15 United States Court of Appeals for the Ninth Circuit.

16 DATED: March 13, 2007.

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19 LAWRENCE K. KARLTON
20 SENIOR JUDGE
21 UNITED STATES DISTRICT COURT
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